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AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

JULY 25 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

LAZARO C.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
LAZARO C., JR.,

Appellees.

2 CA-JV 2008-0025
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD200700195

Honorable Joseph R. Georgini, Judge

AFFIRMED

Kessler Law Offices
By Eric Kessler

Mesa
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

Hernandez, Scherb, & Hanawalt, P.C.
By Richard Scherb

Florence
Attorney for Appellee Lazaro C., Jr.

V Á S Q U E Z, Judge.

¶1 Appellant Lazaro C., father of two-year-old Lazaro C., Jr., challenges the juvenile court's order adjudicating Lazaro, Jr. dependent as to him after a contested hearing.¹ Finding that reasonable evidence supports the court's order and that the issues Lazaro raises do not warrant reversal, we affirm.

¶2 As defined in A.R.S. § 8-201(13)(a)(iii), a dependent child includes "[a] child whose home is unfit by reason of abuse, neglect, cruelty or depravity by a parent, a guardian or any other person having custody or care of the child." Because "[t]he primary consideration in a dependency case is always the best interest of the child[,] . . . the juvenile court is vested with 'a great deal of discretion.'" *Ariz. Dep't of Econ. Sec. v. Superior Court*, 178 Ariz. 236, 239, 871 P.2d 1172, 1175 (App. 1994), *quoting In re Cochise County Juv. Action No. 5666-J*, 133 Ariz. 157, 160, 650 P.2d 459, 462 (1982). We view the evidence in the light most favorable to upholding the court's findings of fact and will not disturb an adjudication of dependency if there is any reason to support the order. *In re Maricopa County Juv. Action No. J-75482*, 111 Ariz. 588, 591, 536 P.2d 197, 200 (1975).

¹In December 2007, the juvenile court adjudicated Lazaro, Jr. dependent as to the mother, who is not a party to this appeal.

¶3 In October 2007, E., Lazaro's nine-year-old niece, accused Lazaro of touching her inappropriately, an accusation she later recanted. Following an investigation by Child Protective Services (CPS), which included two forensic interviews with E. and a physical examination, the decision was made to remove E., her sister, and Lazaro, Jr. from the family home on November 9, 2007; a dependency petition was filed shortly thereafter. The petition alleged, and the evidence presented at the dependency hearing established, that Lazaro had sexually abused E., who lived in the family home; that Lazaro's mother had emotionally abused E.; and that Lazaro's sexual abuse of E. and his failure to protect her from the mother's emotional abuse had placed Lazaro, Jr. in danger of abuse or neglect.

¶4 On the first day of the two-day contested dependency hearing, Lazaro's attorney informed the juvenile court that, although he had been provided with a summary of one of the two forensic interviews, he had just learned that day that the interviews had been recorded. He argued that permitting the Arizona Department of Economic Security (ADES) to offer evidence from the interviews through testimony of Nichole Satterwhite, the forensic interviewer, and Dr. Leslie Quinn, a physician who worked with a child abuse assessment team and who had examined E. and had witnessed one of the interviews, would constitute a violation of Rule 26.1, Ariz. R. Civ. P. (prompt disclosure of information). The first interview was eventually transcribed and introduced as an exhibit at the hearing, but apparently no report was ever prepared regarding the second interview.

¶5 The juvenile court accepted ADES's avowal that it had been unaware of and did not possess any recordings of the interviews and denied Lazaro's request that the dependency proceeding be continued pending disclosure of the recordings. The court found it in Lazaro, Jr.'s best interests to proceed with the hearing. *See* Ariz. R. P. Juv. Ct. 36. However, the court ordered ADES to produce copies of the recordings within ten days and scheduled a pretrial conference for February 13, the day before the dependency hearing was scheduled to continue.

¶6 On January 15, 2008, the Pinal County Attorney filed a motion to limit usage, duplication, and dissemination of the forensic interview recordings and explained that, "only when required by court order, is a possible offending party allowed to view the recording [of a child who may be a victim of neglect or abuse]." Acknowledging that it recognized Lazaro's need to hear the recordings, the county attorney requested on behalf of the Family Advocacy Center that all of the attorneys "be limited to viewing a copy of the recording either at the Family Advocacy Center or at a Superior Court facility and that no copies be made." The county attorney alternatively requested that, if the juvenile court permitted production of the recordings, it order the attorneys not to duplicate or disseminate the copies. The court granted the county attorney's motion and issued an order limiting the attorneys "to viewing a copy of the recording" at the requested facilities and ordered that "the attorneys in this matter . . . not duplicate or disseminate the recording itself to any person, for any purpose." In light of the county attorney's motion, ADES notified the court

it could not comply with the court's earlier directive to provide copies of the recordings within ten days of the first day of the dependency hearing. Lazaro did not object to the county attorney's motion in his response but objected in a separate response to ADES's notice that it was unable to produce the recordings, arguing that ADES had "attempt[ed] to avoid its disclosure obligations . . . by claiming that the recordings of forensic interviews [could not] be produced."

¶7 At the pretrial conference, held on the day before the dependency hearing was scheduled to continue, Lazaro filed a motion to continue or strike the testimony of any witnesses associated with the interviews. After a hearing on Lazaro's motion, the juvenile court ruled that the dependency hearing would proceed the following day as scheduled, over Lazaro's objection. At the beginning of the dependency hearing the following day, Lazaro renewed his objection to proceeding without a copy of the recording or transcript of the second interview, an objection the court again denied.

¶8 On appeal, Lazaro raises various arguments regarding the juvenile court's denial of his motion to continue or suppress and also challenges the sufficiency of the evidence to support the dependency adjudication. He contends the court deprived him of his right to due process by permitting the dependency hearing to proceed despite ADES's failure to disclose the recordings, arguing the court either should have continued the hearing until the recordings were available or suppressed any evidence related to the interviews. He also asserts he was prejudiced by the court's denial of his motion to continue or suppress.

We review the denial of a motion to continue for an abuse of discretion. *See In re Estate of Kerr*, 137 Ariz. 25, 29, 667 P.2d 1351, 1355 (App. 1983).

¶9 As ADES points out in its answering brief, Lazaro has failed to provide us with the transcript of the hearing on the motion to continue pursuant to Rule 104(F)(1), Ariz. R. P. Juv. Ct. When an appellant fails to assure that the record on appeal contains all transcripts or documents necessary for us to consider the issues raised on appeal, we assume the missing portions of the record support the juvenile court’s findings and conclusions. *See State ex rel. Ariz. Dep’t of Econ. Sec. v. Burton*, 205 Ariz. 27, ¶ 16, 66 P.3d 70, 73 (App. 2003). In the absence of the necessary transcript, we cannot find the court abused its discretion by denying Lazaro’s motion to continue. On the second day of trial, just one day after the court denied Lazaro’s motion to continue, the court rejected Lazaro’s renewed request for a continuance, noting “[t]hat record was made yesterday. [Counsel for ADES] avowed to this Court he is not in possession of the recording that you’re referring to that was referred to in your motion . . . [and Lazaro’s counsel is] aware of the Court’s ruling [on] the motion to strike the testimony.” The court’s comments emphasize, again, the importance of that portion of the record Lazaro has failed to designate as part of the record on appeal.

¶10 Moreover, for reasons that are unclear, Lazaro elected not to view the recorded interviews, despite the juvenile court’s January 15, 2008 order permitting him to do so, choosing instead to argue on appeal that ADES had violated its discovery obligation by withholding the recordings. Accordingly, we find unpersuasive Lazaro’s unsupported

argument that he was somehow prejudiced as a result of the court's ruling denying his motion to continue. Moreover, we note that ADES had notified Lazaro in its December 13, 2007 disclosure statement that the interviews had taken place and that it intended to call Quinn and Satterwhite as witnesses at trial; Lazaro apparently elected not to depose those individuals despite that notice.

¶11 Lazaro also contends the juvenile court erred by "proceeding with [the dependency hearing] over Appellant's objection because the Court already made a finding that ADES was required to disclose the recordings, ordered the disclosure, and there was non-compliance with that order." On appeal, Lazaro seems to focus on a perceived failure by ADES to comply with the original disclosure order but fails to acknowledge the court's subsequent order limiting access to the recordings as requested by the county attorney, as if the latter order did not exist. Notably, as counsel for Lazaro, Jr. argues, "It was simply impossible for ADES to produce evidence that it did not have within its control." Accordingly, we find the court did not abuse its discretion by denying Lazaro's motion to continue the dependency hearing.

¶12 Lastly, Lazaro argues there was insufficient evidence to support the juvenile court's finding that Lazaro, Jr. is dependent as to Lazaro. The petitioner in a dependency proceeding must prove the allegations of the petition by a preponderance of the evidence. A.R.S. § 8-844(C)(1); Ariz. R. P. Juv. Ct. 55(C). To the extent Lazaro suggests the court's ruling was improper because the petition "contained no allegations of maltreatment or

inability to parent” Lazaro, Jr., we reject that claim. The dependency petition alleged not only that Lazaro had sexually abused E. but that he had failed to protect E. from the mother’s emotional abuse, placing Lazaro, Jr. at risk for similar abuse or neglect. *See In re Pima County Juv. Action No. 96290*, 162 Ariz. 601, 604, 785 P.2d 121, 124 (App. 1990) (conditions creating dependency to other children in home may pose imminent risk of harm to child at issue). In fact, a CPS caseworker testified at trial that the mother’s abuse “could easily be transferred to another child” in the home.

¶13 Lazaro contends that in light of the fact that E. recanted her allegations of abuse, the absence of physical evidence that she had been sexually abused, and testimony that E. was not credible, the evidence was insufficient to support a dependency adjudication. When ADES questioned Lazaro regarding his relationship with E. at the dependency hearing, Lazaro invoked his Fifth Amendment right against self-incrimination, leaving the juvenile court to consider only the evidence presented by ADES. *Cf. Montoya v. Superior Court*, 173 Ariz. 129, 131, 840 P.2d 305, 307 (App. 1992) (judge in custody proceeding may draw negative inference from father’s invocation of privilege against self-incrimination). In addition, Dr. Quinn testified that children like E. recant allegations of sexual abuse in approximately twenty to thirty percent of the cases where abuse has occurred and that they recant most often because an adult influences them to do so. She opined that this had likely happened here, noting that E.’s proffered basis for recanting was “inconsistent with her developmental stage.” She also testified that Lazaro was a danger to any child placed in his

household. Additionally, the CPS caseworker testified she had been assigned to this case because Lazaro, Jr.'s mother had shaved E.'s head as a form of punishment and had continuously threatened E. that she would be removed from the home. That caseworker, who had observed E. during the forensic interviews, testified that given Lazaro's failure to protect E. from the mother's abuse, combined with the allegations that Lazaro had sexually abused E., returning Lazaro, Jr. to the home would be inappropriate. Based on the record before us, there is abundant evidence supporting the court's conclusion that Lazaro, Jr. is a dependent child and that the home is unfit by reason of abuse.

¶14 For the foregoing reasons, we affirm the juvenile court's order adjudicating Lazaro, Jr. dependent as to his father.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge